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No. 76-557

In the Supreme Court of the United States

OCTOBER TERM, 1976

GEORGE KHOURY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of income tax evasion and of aiding and assisting in the preparation of two false income tax returns for a third party, in violation of 26 U.S.C. 7201 and 7206(2). The court sentenced him to six months in prison and 30 months' probation (Pet. 4).

1. Petitioner first argues (Pet. 4, 5, 8) that he may have been prejudiced by an article appearing in the *Miami Herald* during the trial. However, after the verdict the district court questioned each juror separately whether he had read this article, or whether anyone had discussed it with him, and each juror responded in the negative (Tr. 402-403). The court of appeals therefore correctly concluded (Pet. App. 4) that no prejudice could have resulted.

2. Petitioner further contends (Pet. 5-7) that the district court should have conducted a full hearing, presumably *in camera*, as to what prejudicial effect, if any, resulted from the fact that six jurors did read of the death of one of the government's witnesses the day after he had testified. However, since the obituary that they read "did not relate to [petitioner] or the issues of the trial" (Pet. App. 5) and "was not suggestive in any way upon the question of his guilt or innocence" (*ibid.*; quoting from *United States* v. *Schrimsher*, 493 F. 2d 848, 854 (C.A. 5)), it was sufficient to conduct a poll of the jury, in open court after the verdict, to determine whether the reading of the obituary had affected any of the jurors' votes. The district court conducted such a poll and no prejudice was revealed (Pet. App. 4).

3. Finally, petitioner argues (Pet. 7-9) that because two jurors admitted that they heard about the death of the witness, they must have discussed the case with persons not on the jury, thereby creating a rebuttable presumption of prejudice that called for a full investigation. But the court of appeals answered this argument in the following language, upon which we rely (Pet. App. 5-6):

> This Court prohibits prejudicial private communications between jurors and third parties, and we have required affirmative proof of the harmlessness of private communications outside the jury room. * * * As in all jury misconduct cases, however, we have also recognized that the granting of a mistrial is largely within the discretion of the trial judge.* * * This discretion extends to the type of investigation required. Tillman v. United States, 406 F. 2d at 938. In Tillman, the poll of the jury in open court revealed that no juror had participated in the

> private conversation under investigation. Consequently, the trial judge did not abuse his discretion by refusing to investigate the matter further. In this case the trial judge refused to inquire further when he found that the two jurors had heard only about the death of a witness. Although the defense attorney requested a mistrial, he did not ask the trial judge to inquire further into the circumstances of the jurors' hearing about the death. Because the subject matter is so tenuously related to the case, we cannot say that the trial judge abused his discretion.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1976.

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